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IN THE

Supreme Court of the United States

October Term, 1962

No: 375

EX PARTE GEORGE

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Reasons Why The Petition Should Not Be Granted

(1) The Respondent must call to the attention of the Court that the Petitioner did not challenge the constitutionality of the Texas statute in his petition for a writ of habeas corpus. The issue was first raised in his petition for rehearing in the Supreme Court of Texas, and the petition was not entertained. Accordingly, the question is not before the Court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128; *Consolidated Turnpike Co. v. Norfolk & O. B. Ry.*, 228 U.S. 326, 333-334; *Chicago, Ind. & L. Ry. v. McGuire*, 196 U.S. 128, 131-133.

(2) This decision was handed down by the Supreme Court of Texas prior to the decisions of this Court in

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, and *Lucas Flour Co. v. Local 174, Teamsters' Union*, 369 U.S. 95, which confirm that State courts have not been deprived of their jurisdiction over labor management relations in interstate commerce except in cases where the pre-emption doctrine applies. That doctrine, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, is conscientiously applied by the Supreme Court of Texas, see *Ex Parte Dilley*, 160 Tex. 522, 334 S.W. 2d 425, and the Petitioner does not even suggest that the Supreme Court of Texas is ignoring its obligations. Furthermore, no challenge was made to the injunctive relief given by the State court. Therefore, the issue reserved in *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 514, as to whether the Norris-LaGuardia applies to the states, is not raised in this case. As a result, this important issue cannot be reached in this controversy.

(3) In an effort to make this case appear to be significant the Petitioner raises an abstract and hypothetical question not even involved: Can a state ban all picketing? The answer is quite clear. Of course no statute, state or federal, can ban all picketing without violating the guarantee of free speech found in the First Amendment and applied to the states through the Fourteenth. It is equally clear, however, that picketing involves more than mere speech, *Teamsters v. Vogt, Inc.*, 354 U.S. 284; *Bakery Drivers v. Wohl*, 315 U.S. 769, 776 (concurring opinion of Mr. Justice Douglas), and thus is subject to reasonable regulation by the Federal Government, principally through the Commerce Clause, and by the state governments through their police powers. The Congress, for example, prohibits even peaceful picketing to compel a secondary boycott (LMRA § 8(b)(4), as amended; 29 U.S.C.A.

§ 158(b)(4), to secure recognition in certain situations (LMRA § 8(b)(7), as amended; 29 U.S.C.A. § 158(b)(7), and to extort money from the employer (LMRDA § 602(a); 29 U.S.C.A. § 522. And this Court has upheld such statutes over challenges that the right of free speech had been infringed. *NLRB v. Denver Bldg. & CTC*, 341 U.S. 675; *Int'l Bhd. of Electrical Workers v. NLRB*, 341 U.S. 694. See *Local 761, IUE v. NLRB*, 366 U.S. 667.

This Court has also recognized that the states have a legitimate police power over picketing, so long as it is exercised reasonably and in furtherance of a valid state policy. In the words of this Court, there is

> "a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Teamsters v. Vogt, Inc.*, 354 U.S. 284, 293.

That "broad field" includes all activity neither protected by § 7 nor prohibited by § 8 of the LMRA, as amended. *Auto Workers v. Wisconsin Board*, 336 U.S. 245. Examples of state policies limiting picketing which have been recognized by this Court include: policy against racial discrimination in employment, *Hughes v. Superior Court*, 339 U.S. 460; policy of equal purchasing opportunities, *Giboney v. Empire Storage Co.*, 336 U.S. 490; policy of equal employment opportunities, *Building Service Employees v. Gazzam*, 339 U.S. 532; policy against discrimination in employment based on union membership vel non, *Plumbers Union v. Graham*, 345 U.S. 192; policy against using pickets to collect a debt, *Bakery Drivers Union v.*

Wagshal, 333 U.S. 437; and the policy of channeling the picketing only against those directly involved in the dispute, *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722.

Can anyone quarrel with a State's efforts to limit the militant aspects of picketing to the "front lines" of economic warfare? Is it not a valid public policy, for example, to prohibit altogether the picketing of the homes and families of those involved in an industrial dispute as is done in Colorado, Connecticut, Florida, Hawaii, Kansas, Michigan, and Utah?[1] See *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740. Strikes and picketing are bitter enough experiences for the combatants. Innocent persons in the community, and especially those in other communities, unconnected with the economic warfare, should be spared.

The Texas statute (Art. 5154(d) § 4) here serves that same public policy. It did not interfere with the Maritime Union's striking and picketing at any primary situs of employment or at any dock where Respondent's ships might appear. It was only when the Maritime Union left the port, went to the mainland, and began picketing a refinery where there were neither ships nor sailors, much less members of the NMU, that the statute applied.[2]

As petitioner himself stipulated (Petition, p. 4a et seq), there was no labor dispute at this refinery. The refinery

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[1] Colorado Stats., § 94 (8)(2)(a); Connecticut Stats., § 31-120; Florida Stats., § 447.09(11); Hawaii Stats., § 11526; Kansas Stats., § 44-809(12); Michigan Stats., § 423.9(f); Utah Stats., § 34-1-8(2)(a). For convenience, refer to BNA-LRX, Strikes, Picketing and Boycotts, §§ 59, and BNA-SLL.

[2] Petitioner, recognizing the weakness of his position, seizes on the fact that there is a pipeline connection with some docks. But this pipeline connection is simply another method of transporting Respondent's products to its many customers, useful to the same extent as rail and truck transport.

workers had a collective bargaining agreement containing a no-strike clause which had been negotiated for them by their duly certified union, the Oil, Chemical & Atomic Workers International Union, AFL-CIO. The Maritime Union did not come to organize the refinery workers, to seek recognition, nor to protest unfair labor practices at the refinery. The purpose of the picketing was to induce the employees represented by Oil, Chemical & Atomic Workers to breach their collective bargaining agreement.[3]

It is well settled that breach of a collective bargaining agreement is not protected activity, *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342-345, and neither is the refusal to cross a picket line, *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71. Breach of a collective bargaining agreement does not constitute an unfair labor practice under any of the subdivisions of § 8(b) of the LMRA, supra. See, e.g., *Textile Workers v. Lincoln Mills*, 353 U.S. 448; *Local 761, IUE v. NLRB*, 366 U.S. 667; *NLRB v. Drivers Local Union*, 362 U.S. 274. It follows that the NLRB does not have any jurisdiction in these instances. *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 514; *Garner v. Teamsters' Union*, 346 U.S. 485. See *NLRB v. Insurance Agents Union*, 361 U.S. 477.

Thus, in this precise factual situation, after carefully considering the second *Garmon* case, supra, the Supreme Court of Texas correctly held that the NLRB did not even arguably have jurisdiction here. If the objective sought is not protected activity, it necessarily follows that the means used to achieve that objective are not protected. See *NLRB v. Local 1224, Electrical Workers*, 346

[3] For further details of petitioner's stipulation, see Petition p. 4a, 5a, 10a, 11a, 12a. See also Tr. 4, 5-6; S.F.T.I. 35.

U.S. 464. Inducing a breach of a no-strike agreement has been specifically held to be not protected by the NLRB. *Kraft Foods Company*, 108 NLRB 1164; *National Electric Products Corporation*, 80 NLRB 995; *Stockham Pipefittings Company*, 84 NLRB 629. See also *NLRB v. Kaiser Aluminum & Chemical Corporation*, 217 F. 2d 366 (C.A. 9); *Harnischfeger Corporation v. NLRB*, 207 F. 2d 575 (C.A. 7). Neither is this activity prohibited under any of the provisions of § 8(b), supra. Thus, the Texas policy, as expressed in this statute, came into play to prevent the Maritime Union from imposing their dispute on others in a different locale who were not involved in the maritime controversy.

Carpenters Union v. Ritter's Cafe, supra, is particularly significant here. There the Union wished to bring pressure to bear on employer of non-union labor at a construction site. Rather than picket that site, the Union instead picketed a restaurant owned by such employer at an entirely different location. The State enjoined that picketing, and this Court affirmed, stating:

> "Recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute." 315 U.S. at 728.

Conclusion

For the foregoing reasons this petition for certiorari should be denied.

BAKER, BOTTS, SHEPHERD & COATES

By _____

Attorney for Respondent

Certificate of Service

This is to certify that on the _____day of September, 1962, a true and correct copy of this Brief in Opposition was served upon Messrs. Mandell & Wright, 707 South Coast Building, Houston 2, Texas, and Messrs. Cooper, Ostrum, De Vacco & Ackerman, 655 Madison Avenue, New York, New York, by placing the same in envelopes addressed to each of them, postage prepaid by certified mail, and deposited in the United States mails.